

CATCHWORDS – IMMIGRATION – visa – good character – general conduct – decision set aside.

Marriage Act 1961

Migration Act 1958 – ss 20, 31, 234, 499, 501

Migration Regulations – Schedules 2, 4

Statutory Declarations Act 1959 – s 11

Goldie v Minister for Immigration and Multicultural Affairs (1999) 56 ALD 321

Irving v Minister for Immigration, Local Government and Ethnic Affairs (1996) 139 ALR 84; (1996) 68 FCR 422

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353; (1995) 39 ALD 206; (1995) 69 ALJR 423; (1995) 183 CLR 278

Msumba and Department of Immigration and Multicultural Affairs (unreported, 8 February, 2000, Decision [2000] AATA 87)

Ragni Mala Prasad and Minister for Immigration and Ethnic Affairs (unreported, 7 November, 1994, Decision No. 9822)

Re Lachmaiya and Department of Immigration and Ethnic Affairs (1994) 19 AAR 148

Wasu Deo Naidu and Department of Immigration and Ethnic Affairs (unreported, 27 September, 1994, Decision No. 9753)

Wasu Deo Naidu and Department of Immigration and Ethnic Affairs (unreported, 2 May, 1996, Decision No. 10910)

Watt v Rama [1972] VR 353

DECISION AND REASONS FOR DECISION [2001] AATA 720

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	S2000/353
GENERAL ADMINISTRATIVE DIVISION	)	

Re AHLAM EL CHAAR

Applicant

And MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Respondent

DECISION

Tribunal	Miss S A Forgie (Deputy President)
Date	16 August, 2001
Place	Adelaide
Decision	The Tribunal: 1. sets aside the decision of a delegate of the Minister dated 21 August, 2000; and 2. substitutes a decision that the applicant should not be refused a visa on character grounds pursuant to s. 501.

S A FORGIE
Deputy President

REASONS FOR DECISION

On 6 September, 2000, the applicant, Mrs Ahlam El Chaar, lodged an application for review of a decision of a delegate of the respondent, the Minister for Immigration and Ethnic Affairs ("the Minister") dated 21 August, 2000. In his decision, the delegate had refused a visa application made by Mrs El Chaar's husband, Mr Abdul Karim El Chaar, for a Class UF Partner (Provisional) Visa (Subclass 309) ("Partner Provisional Visa") under the *Migration Regulations* ("Regulations"). Such a visa would have permitted Mr El Chaar permanent entry to Australia.

2. At the hearing, Mrs El Chaar was represented by Mr Hemsley and the Minister by Mr Leerdam. The documents lodged pursuant to **s. 37** of the *Administrative Appeals Tribunal Act 1975* ("T documents") were admitted in evidence. Also admitted were statements from Mr and Mrs El Chaar, a resumé of Dr Marie Jose O' Neill, who is a Clinical and Child Psychologist, Dr O'Neill's report dated 7 January, 2001, a video of Mr El Chaar and members of his family, a police statement regarding a fire at the home of Mrs Khadige Charamand, who is the grandmother of Mrs El Chaar, and a statement by Mrs Charamand. Oral evidence was given by Mrs El Chaar in support of her case together with Mr El Chaar, Dr O'Neill and Mr Toufic Kanj. Mr Ahkmit Kanj and Mrs Charamand gave evidence in support of the Minister's case.

THE ISSUE

3. The issue in this case is whether Mr El Chaar is a person who is not of good character within the meaning of **s. 501** of the *Migration Act 1958* ("Migration Act"). If he is not, he does not pass the character test but a further issue arises. That is whether or not he should be refused a visa on the basis that he does not pass the good character test.

BACKGROUND

4. On the basis of the material in the T documents and on the evidence at the hearing, I have made a number of findings of fact that I will set out in the following paragraphs.

5. Mr El Chaar was born in Tripoli in Lebanon on 6 March, 1971. He has five brothers and three sisters, all of whom live in Lebanon. His mother and his wife's father are sister and brother. His parents continue to live in Lebanon as do his brothers and sisters.

6. Mr El Chaar first entered Australia on 10 November, 1992 as a visitor on a Class 673 Visa with a Temporary Entry Permit ("TEP visa") for three months. That visa, which he had obtained on 19 October, 1992 in Damascus in Syria, expired on 11 February, 1993. In his application, he gave as his reason for visiting Australia that he wished to visit his family. Mr El Chaar's TEP visa was extended for two periods and he was permitted to stay lawfully in Australia until 7 May, 1993. On the expiration of his visa, Mr El Chaar did not leave Australia.

7. On 28 May, 1993, Mr El Chaar lodged an application for refugee status. While his application was being considered, he lodged an application for a processing entry permit and did so on 3 June, 1993. A little later, on 5 July, 1993, he lodged an application for permission to engage in employment in Australia. In a letter dated 21 February, 1994, Mr El Chaar was advised that a delegate of the Minister had refused his application for refugee status and, as a consequence, had also refused his application for permission to engage in employment in Australia. After reviewing the evidence, the delegate concluded that Mr El Chaar was not a refugee because he did not have a well-founded fear of persecution.

8. The delegate's letter stated that Mr El Chaar had either to seek review of the decision or leave Australia within a stipulated time period. Mr El Chaar chose not seek review of the delegate's decision and left Australia voluntarily on 17 March, 1994.

9. On 26 February, 1994, Mr El Chaar and his first cousin, Ms Nada Kanj, signed a Notice of Intended Marriage under the *Marriage Act 1961*. The notice stated that the marriage was arranged for 25 August, 1994. It was to be celebrated according to Islamic rites. Mr El Chaar and Ms Kanj were engaged on 5 March, 1994 and he then lodged, on 8 March, 1994, an application for a Prospective Marriage Visa (Subclass 300). In that application, Mr El Chaar described himself as having been a welder for the previous five years. At the time, Ms Kanj was 18 years of age having been born on 8 December, 1975. Ms Kanj, who sponsored his application, was still a student and lived at home with her three sisters and one brother.

10. As Mr El Chaar had overstayed his visa on his previous visit to Australia, he was excluded from re-entry for a period of 12 months. In a letter dated 11 June, 1994, Mr El Chaar asked that the period be waived and explained that he had overstayed because his fiancée was ill. His letter was supported by a letter dated 9 June, 1994 from Ms Kanj's doctor. The application for waiver was approved on 18 June, 1994. He was issued with a Subclass 300 visa, which expired on 8 February, 1995.

11. Mr El Chaar returned to Australia on 8 August, 1994. He and Ms Kanj were

married at Ashfield in New South Wales on 11 September, 1994. In a statutory declaration dated 26 October, 1994, Ms Kanj stated that Mr El Chaar had "*pushed*" her to conclude the marriage. Ms Kanj added that the marriage was never consummated and that he continued to live with his grandmother and she to live with her parents. She also stated that Mr El Chaar kept promising to fulfil all of the religious requirements but she discovered that he was not genuine in his relationship. Ms Kanj stated that Mr El Chaar was "... *just aiming to secure a status of Permanent Residence*" (T documents, page 135). She withdrew her sponsorship of his application.

12. On 15 December, 1994, Mr El Chaar applied for a Family (Residence) Visa. In a statutory declaration, Mr El Chaar stated that he and his wife lived with their cousin at Punchbowl. Mrs Houda Salem made a statutory declaration stating, among other things, that Mr El Chaar and Ms Kanj lived with her, and continued to live with her, at Punchbowl. While his claim was being considered, he was granted a Bridging Visa A with effect from 9 February, 1995. After various investigations, the delegate concluded that Mr El Chaar's marital relationship with Ms Kanj was not a genuine and continuing relationship and that Ms Kanj no longer supported Mr El Chaar's application. His application was refused on 11 July, 1995. Unless he applied for another visa, he was advised by the delegate that he had to leave Australia by 16 August, 1995.

13. Mr El Chaar then lodged an application for a Change in Circumstance (Residence) Class, Subclass Family. He did so on 26 July, 1995. The basis of his application was that he had a special need relative. The relative he nominated was his grandmother, Mrs Khadige Samia Charamand. Mrs Charamand, who is a permanent resident of Australia, nominated Mr El Chaar. Mr El Chaar lodged his application on 20 July, 1995 and, shortly afterwards on 26 July, 1995 lodged an application for a Bridging Visa. In that application, he sought permission to work as he needed to earn money in order to pay his expenses.

14. In a supporting statutory declaration, Mr El Chaar stated that he had been living with his grandmother since he came to Australia in 1992. They had lived at a "*few different addresses*" in Sydney and in Adelaide. He continued:

"My grandmother is in need for some one to look after her all the time because she is an old lady, and no one is helping her.

She spend most of her time with friends and people she knows, hoping that they can help her, because she can't live at her home on her own at that age.

Since I have arrived to Australia she has been living with me even when I got married on 11-9-94 she still stayed with me. On the 25-5-95 I was separated from my wife and she withdrew her sponsership (sic) and as a result I have to go back to Lebanon.

Currently I am living with my grandmother, she wants me to stay and asked to sponsor me. As for myself, I wish to stay with her, help her as I will not hesitate to help my beloved grandmother in Australia." (T documents, page 316)

15. His application was also supported by a statutory declaration dated 4 August, 1994 from Mrs Charamand. She stated that she had migrated to Australia 25 years before and was now 73 years of age. After detailing her ailments, Mrs Charamand stated:

"I am an old person now, and I am afraid to live alone. I am in need of someone who could be living with me all the time. I need someone to help me in my daily life requirements and take care of me. As my grandson has come from Lebanon now, he helps me in all my daily needs, does not grumble, takes me to the doctor and wherever I want to go, sleeps near my bed and wakes up at night to help me have a medicine or drink water.

I therefore wish very much that my grandson stays with me for long as I live, takes care of me as I do not have no one else to turn to." (T documents, page 317)

16. Her letter was supported by an undated letter from Ms Marial Sabry, the Community Development Co-ordinator of the Australian Arabic Welfare Council Inc. Ms Sabry asked that Mr El Chaar be granted permanent residency so that he could look after Mrs Charamand and provide her with emotional support (T documents, page 318). On 23 August, 1995, Mrs Charamand signed a statutory declaration withdrawing her support for Mr El Chaar's residency application.

17. On 6 December, 1995, Mr El Chaar made a complaint regarding apprehended domestic violence against him by Ms Kanj's father, Mr Ahmad Kanj. Mr Kanj was alleged to have assaulted Mr El Chaar at his grandmother's house. He was required to attend at the Local Court at Bankstown on 5 January, 1996. On 9 January, 1996, Ms Kanj made a complaint against Mr El Chaar alleging that he had made threats against her family and had threatened to kill her grandmother.

18. On 19 January, 1996, Mr El Chaar pleaded guilty to making a false statement contrary to s. 234 of the Act. He was convicted in the Local Court and ordered to enter a bond on his own recognisance in the sum of \$700 to be of good behaviour for a period of two years. In addition, he was ordered to pay a pecuniary penalty of \$3,000 to be paid by 29 January, 1997. On the same day, Mrs Houda Havda Salem was convicted of making a false statement contrary to s. 11 of the *Statutory Declarations Act 1959*. The false statement was to the effect that he and Ms Kanj had been living with her temporarily and for the time being at an address in Punchbowl when Ms Kanj had never lived at those premises.

19. On 22 February, 1996, Mrs Charamand made a statutory declaration stating that she had been living with her son in Adelaide for the previous three weeks. She had left Sydney on 21 January, 1996, she said:

"... to escape the violence & threats from Abdul Karim El Chaar. I withdrew my support for Abdul Karim El Chaar's application or nomination due to being subjected to violence from him. I am an able person with full support from my many children & grandchildren in Australia." (page 345)

20. On 26 March, 1996, the Local Court at Bankstown imposed an Apprehended Violence Order on Mr El Chaar in relation to Ms Kanj. This was followed by Ms Kanj's filing an application for divorce on 29 May, 1996. The decree nisi was granted on 11 August, 1996.

21. A delegate of the Minister refused Mr El Chaar's application for permanent residence. He did so on 27 June, 1996. He then lodged an application for review of that decision.

22. On 9 December, 1996, Mr El Chaar married Ms Ahlam Kanj (Mrs El Chaar), who was also his first cousin. They married in Sydney. Ms Nada Kanj and Ms Ahlam Kanj are also first cousins. Mr El Chaar withdrew his application to review the decision to refuse him permanent residence and did so in a letter dated 11 February, 1997.

23. Mrs El Chaar was born in Australia on 18 September, 1971. Her parents, who were born in Lebanon, are both Australian citizens. Mrs El Chaar's father migrated to Australia from Lebanon in 1956. In 1964, he married her mother, who then lived in Lebanon, by proxy. Mrs El Chaar's mother did not arrive in Australia until 1965. Her parents are first cousins. They have continued to live in Australia and have had seven children who, in turn, have given them fourteen grandchildren.

24. Mrs El Chaar attended school and except for two periods spent in Lebanon, she has lived in Australia all her life. Mrs El Chaar had married Mr Barodi in 1990. They were not related to each other and it was a marriage arranged by his sister and Mrs El Chaar's uncle. At the time that it was arranged, Mr Barodi lived in Lebanon. Following their marriage, Mr Barodi was granted permanent residence in Australia. There are two children from that marriage. The elder is Joumana, who was born on 4 June, 1992 and is now 9 years of age. The younger is Jenan, who was born on 26 October, 1993 and is now 7 years of age. Mrs El Chaar left her first husband in 1994 after claiming that she had suffered mental and physical abuse at his hands. She lodged an application for divorce and was granted a decree nisi on 10 July, 1996. It became absolute on 11 August, 1996 (T documents, page 525).

25. After their marriage, Mr and Mrs El Chaar stayed in New South Wales for a period and then stayed with Mrs El Chaar's parents in Adelaide. On 12 February, 1997, they left Australia and travelled to Lebanon. She left her children with her parents in Adelaide.

26. On Mr El Chaar's return to Beirut, he lodged an application for a Provisional Spouse Visa (Subclass 309). He did so on 12 March, 1997. Mrs El Chaar lived in Beirut with Mr El Chaar from February, 1997 until 13 July, 1997 when she returned to Australia. Mr El Chaar's application for a Provisional Spouse Visa (Subclass 309) was refused and Mr El Chaar applied to this Tribunal for review of that decision. He did so on 5 September, 1997. Mrs El Chaar returned to Lebanon on 14 October, 1997. Again, she left her children with her parents in Adelaide. She stayed until 17 February, 1998 when she returned to Australia. The Tribunal affirmed the delegate's decision on 11 November, 1998.

27. On 13 August, 1999, Mr El Chaar lodged a further application for a Provisional Spouse Visa (Subclass 309). Again, he lodged his application in Beirut. Mrs El Chaar returned

to Lebanon on 29 October, 1999. On this occasion, she took her children with her. She, Mr El Chaar and the children stayed with her parents in law in Tripoli as well as with Mr El Chaar's brothers and sisters. A delegate of the Minister again refused Mr El Chaar's application and that decision was made on 13 March, 2000.

28. On 29 May, 2000, Mr El Chaar lodged a further application for a Provisional Spouse Visa (Subclass 309) in Beirut. When his application was refused on 21 August, 2000, he lodged an application for its review in this Tribunal. These proceedings are a result of his application. Mrs El Chaar was already expecting their son, Zouheir, who was born on 2 February, 2001 after her return to Australia in October, 2000.

THE EVIDENCE

Mr El Chaar's life in Lebanon before he travelled to Australia

Mr El Chaar

29. When asked why he had applied for refugee status, Mr El Chaar said that he had fears of what happened in Lebanon. There had been shooting from the occupying Syrian forces. On many occasions, he was stopped by members of the Syrian forces. Everyone in the country was stopped by them. Members of the Syrian forces could take the jobs of the Lebanese and could have whatever they asked for. It was not a normal life, Mr El Chaar said. He was scared. The forces stopped him at the checkpoint and harassed him. Harassment took the form of stopping him at the checkpoint as he drove to work and asking for his identity papers. Mr El Chaar said that he would be told that he belonged to some political party or other. He said that the forces wanted him to admit to something that he had not done so that he could be arrested. Mr El Chaar believed that they wanted his car. Sometimes they took money from him. Sometimes, he and others would be taken from their houses and taken to a building. Someone had said that he belonged to a political party. At first, he denied it but then said that he had after he had been slapped on the face. Two hours later, the Syrian forces let him go. Later, they went to his shop and took a heater without paying for it. Mr El Chaar said that he was taken many times and was beaten many times. Sometimes, he would be allowed to pass the checkpoint and, at others, he would not. It was a terrible time, he said. He would go to the police but they said that they could not do anything about it.

30. In cross-examination, Mr El Chaar said that he visited his uncle's house each day and ate dinner there each day. During that time, he fell in love with Ms Kanj. When asked why he had applied for refugee status and not for a visa based on marriage, Mr El Chaar said that he could not apply for such a visa immediately. A person has to be ready to get married, he said. He was not ready for marriage when he applied for refugee status. Matters such as a wedding and furniture had to be arranged.

The meeting and marriage of Mr El Chaar and Ms Kanj

Mr El Chaar

31. Mr El Chaar said that his mother and uncle had talked to him about Ms Kanj while he was in Lebanon. They said that if he and Ms Kanj saw each other and if they decided to marry, they could marry. When he arrived in Australia, Mr El Chaar went to his uncle's house, met Nada and they talked about an engagement and marriage so that the family could be together. Those discussions occurred during his first visit to Australia.

32. In cross-examination, Mr El Chaar said that he has five uncles in Australia. Each has daughters and each wanted to arrange a marriage to someone of his own background and culture. He considered marriage to Uncle Ahkmit's daughter (Ms Kanj), Uncle Mohamed's daughter and Uncle Toufic's daughter (Mrs El Chaar). Uncle Mohamed's daughter was young and he did not consider her. He saw Ms Kanj first and then came to Adelaide to see Mrs El Chaar after he had been in Australia for 2¹/₂ years. He was in love with Ms Kanj and, he said, she with him. Mr El Chaar said that he came to Australia to see Uncle Ahkmit's daughter but his other uncles wanted him to see their daughters. He, however, had seen the one he wanted to marry and he did not think of the others.

33. When he returned to Australia, Mr El Chaar said that he stayed at the home of his uncle (Ms Kanj's father) and started preparing for the wedding. The Sheik was visited and a hall at Punchbowl was booked for the ceremony. They were married according to Australian law but the Islamic ceremonies were not completed. Until those ceremonies were completed, he said, they could not live together. Mr El Chaar said that the ceremony was cancelled because he could not keep up with the expense of the ceremony and that of providing and furnishing a house. The family asked for money and his grandmother assisted by purchasing the engagement ring for \$2,500. His uncle told him that money in the order of \$20,000 to \$25,000 was needed to meet those expenses. Mr El Chaar said that his uncle told him that his grandmother would help him but his grandmother told him that she would not. His uncle then told him that he could get the money from his family in Lebanon and from family friends in Sydney. Mr El Chaar said that he tried to raise the money but was unsuccessful. When that occurred, Mr El Chaar said that his uncle told him to leave his house and to live with his grandmother.

34. In cross-examination, Mr El Chaar said that Mrs El Chaar's father had not asked for money to marry his daughter. Whether money is requested is a matter for the family.

Mr Ahkmit Kanj

35. Mr Ahkmit Kanj, who is the father of Mr El Chaar's first wife (Ms Kanj), first met Mr El Chaar when he arrived in Australia and stayed at the home of one of Mr Kanj's brothers in Sydney. His brother asked him to meet Mr El Chaar. It was some three or four months later that Mr El Chaar asked for his daughter's hand. Mr Kanj explained that, when a boy asks for a girl's hand, it is first a matter of agreement between the girl and the boy. If they

come from the same family, there is no agreement about money and it is just a question of how much the family can help the boy. If the family does not know the boy and he is not from the family, money is requested. The amount of money requested could be \$1,000 for furniture but could be \$20. As Mr El Chaar was a member of the same family, there was no agreement on this occasion. Mr Kanj said that he tried to help him and so did Mr El Chaar's grandmother.

Events after the marriage of Mr El Chaar and Ms Kanj

Mr El Chaar

36. In cross-examination, Mr El Chaar said that he left his uncle's house about a month after the marriage ceremony. At that stage, the marriage was in trouble.

37. After the ceremony was cancelled, Mr El Chaar said in giving evidence that he was taken to his grandmother's friend, Mrs Salem. That friend pretended to know about migration law but she did not. She helped him to fill out an application form on the grounds that he was married. He had the marriage certificate. After one or two months, the Department of Immigration and Multicultural Affairs ("Department") asked him to attend an interview and produce evidence of his marriage. In his statement, Mr El Chaar acknowledged that he forged the signature of Ms Kanj on a document he took to that interview. He pretended that they were living together. He knew that was not so and had known at the time he completed his application. Mr El Chaar said that he did so in an effort to gain permanent residence but accepted that he had done the wrong thing. He said that he had done so as he was in love with Ms Kanj and did not believe that what had happened was because of money. At the time, he was emotionally broken and was not thinking properly. He did not want to lose his wife. There had been nothing wrong in the beginning but then her family wanted him to go back to Lebanon.

38. When his application was refused, Mr El Chaar said, his grandmother told him that she would do something to help him. He had helped her, she told him, and so she would help him. With Mrs Salem's help, his grandmother then made another application. Before this time, he said, he had never heard of a special needs visa. Mr El Chaar agreed that his application was lodged within eight days of the refusal of his spouse visa. Mr El Chaar said that he was aware that his grandmother had withdrawn her application and believed that she had done so at the request of his uncle. He talked to his grandmother about her decision. She only told him that she did not want to support his application any more.

39. At no time had he hit his grandmother or shown her any violence. After he was asked to leave his uncle's house, Mr El Chaar said, he stayed at the house of Mrs Salem. During most of that time, his grandmother lived in that house as well. At no time had he hit her. In cross-examination, Mr El Chaar explained that he spent time with his grandmother during the day. He helped her by doing jobs such as mowing the lawn. She preferred to stay at Mrs Salem's house during the night.

40. The house of Mr El Chaar's grandmother was burnt. Mr El Chaar denied having anything to do with its burning. He denied telephoning her in recent times and he denied

threatening to kill her.

41. Mr El Chaar said in cross-examination that his actions in the past had been motivated by his wishing to obtain permanent residence in Australia. His father in law had wanted to "*kick ...[him] out*". He, however, had not gone to Australia just to get a permanent visa but to see his family. Once here, he saw his cousin and wanted to get married and live a normal life. It did not go as he wished and it was all a problem when Ms Kanj's family wanted him out of the country. Her family wanted him to sign a paper so that the marriage could be taken from the register and she was always single. Mr El Chaar wanted to stay and that was why he took the steps he did to mislead the Department. He said that he did not mean to break the rules but he had lost the one he loved. Although he tried to get back together with Ms Kanj, it did not work out.

Mr Ahkmit Kanj

42. Mr Kanj said that, once Mr El Chaar returned to Australia, he and his daughter spoke about the future all of the time. He then asked Mr El Chaar to put his name down at the unemployment office so that he could get work. Then he heard an argument between Mr El Chaar and his daughter. When she asked him about getting work, Mr El Chaar told her that his working or not was not her business. His daughter was upset and told her father that Mr El Chaar was not her type and they could not work it out. Mr Kanj said that he did not understand what was going on and spoke to Mr El Chaar. He told him that it was better that he told her that he would go with his uncle to look for work. Mr El Chaar told him that he did not care. When his daughter saw that Mr El Chaar was not suitable for her, she went to the Department.

43. Mr Kanj said that he noticed that Mr El Chaar changed after the Australian marriage certificate had been obtained. Mr El Chaar kept the marriage certificate in his pocket. He and his daughter never went through the religious ceremony, Mr Kanj said. Mr Kanj said that Mr El Chaar told him that he could not speak to him as he did because he was married now. His daughter started asking questions about matters other than work. Mr El Chaar would not listen to her. He thought differently, Mr Kanj said, and he and his daughter were not "*matched in brain*". His daughter told her father that she did not want Mr El Chaar. She said that she could not speak with him and he bossed her about even though they were not yet married. This conversation occurred about a week after they had obtained the Australian marriage certificate. At that time, the booking had already been made for the Islamic ceremony.

44. Mr Kanj denied that he had ever asked for money. His mother (Mr El Chaar's grandmother), he said, had paid Mr El Chaar's fare to return to Lebanon and then to return to Australia so that he could apply for the visa on the basis he would marry his daughter. Why, Mr Kanj asked, would the family ask for money when it had paid those fares? He also denied that he asked Mr El Chaar to buy gold for them. If he had asked for money at all, he had asked for only a dollar to make the arrangement. His mother, Mr Kanj said, was going to give her grandson and grand daughter money to buy gold and furniture. He did not know how much she intended to give. He did know that she had given Mr El Chaar \$US2,000 to buy gold for his daughter. Mr Kanj said that he told his mother not to give any more money as Mr El Chaar and his daughter were having fights and all was not going well. He did not know whether his

grandmother was going to give \$12,000. It was usual for everyone in the family to help a couple. Mr Kanj said that he paid \$12,000, his mother \$6,000 and his brother \$1,000. Payment of money was not compulsory.

45. Mr Kanj said that his mother did not tell her family that Mr El Chaar had hit her until Mr El Chaar returned to Lebanon on the last occasion. Mr Kanj said that Mr El Chaar lived with his grandmother at her house until that house was burnt. He then went to live with Mrs Salem.

The meeting and marriage of Mr and Mrs El Chaar

Mrs El Chaar

46. Mrs El Chaar said that she first met Mr El Chaar when she was still married to her first husband. That was in 1992 and her elder daughter was then 6 months old. Mr El Chaar would visit her and her children and bring her grandmother, Mrs Charamand, with him. Mr El Chaar got on well with her grandmother, who was also his grandmother. He took her shopping and she would sit next to him. Her own relationship with her grandmother was good. She would visit her and see if she needed any help. Her grandmother never complained to her of any violence towards her by Mr El Chaar. She knew that Mr El Chaar had returned to Lebanon after she had first met him but said that it was none of her business.

47. Mrs El Chaar said that her first husband was very abusive to her in both a physical and a mental sense. They separated in 1994. At first, they lived separately and apart in the same house but her husband then left the house permanently and travelled to Lebanon. He now lives in Sydney.

48. Mrs El Chaar said that Mr El Chaar asked her to marry him a couple of months before they did marry. They had not discussed the issue before that time. Mrs El Chaar agreed with Mr Leerdam that they had talked about their future plans. Those future plans concerned how many children they would have and where they would live. They intended to have a big house and he to have a secure job. Their discussion regarding their future plans occurred during their engagement. Mrs El Chaar said that she did ask him about his immigration status and he told her that it was nearly finished. Everything would be "OK". She asked him a couple of months before they were married. Mrs El Chaar said that she knew that his grandmother had withdrawn her support for Mr El Chaar's application but she did not know why her grandmother had done that. She thought that her uncle was behind her grandmother's actions. Mr El Chaar said that everything would be "OK". He did not go into details with her as she knew nothing about migration.

49. Mrs El Chaar later said that her grandmother had told her that she would support Mr El Chaar's application and she had driven both of them to the Department at Bankstown. When her grandmother withdrew her support, she did not ask her why. She did not do so as she said that she knew the sort of grandmother that she had. Her grandmother would say one thing and turn around and say another. She did not bother asking her.

50. Mrs El Chaar said that she knew that Mr El Chaar had a marriage certificate in relation to his marriage to Ms Kanj but knew that the marriage had not been consummated. She said in reply to Mr Leerdam that she did not know that his immigration status was dependent on his marriage to Ms Kanj. As far as she knew, it was reliant on what her grandmother had done. She did not agree that marriage to her was the basis of his remaining in Australia. Their relationship was the only reason for his staying. She said that she would do anything to bring him to Australia.

51. Mrs El Chaar said that she did not know that, during 1995, Ms Kanj had withdrawn her support for his migration but that he continued to maintain that they were in a marital relationship. He only told her bits and pieces about his situation. Mr El Chaar told her that he was still dealing with migration and with Ms Kanj but Mrs El Chaar did not want to get into it as she knew that he was "*pretty upset*". She could not remember what he had told her other than that he would soon be divorced and they could be married. It would be the start of a new life. Mrs El Chaar knew that Mr El Chaar would have to return to Lebanon before he could return as her husband. She did not want him to go.

52. Later, in cross-examination, Mrs El Chaar said that she knew in 1998 that Mr El Chaar had been convicted of making a fraudulent statutory declaration. He had gone to court and he had been placed on a bond. Although Mr El Chaar had been convicted, she said, he had signed the declaration because a "*false migration agent*" had put the forms in front of him and he signed them.

53. In re-examination, Mrs El Chaar said that Mr El Chaar had been very upset about the treatment that he had received from Ms Kanj's family. Her family had turned against him when he would not pay them the money they wanted. Mrs El Chaar said that her uncle had told her husband that, if he could not produce \$25,000, he could not marry his daughter. Ms Kanj, said Mrs El Chaar, wanted a "*princess wedding*".

54. Although there was no formal engagement, they told people that they were thinking of getting married. Mrs El Chaar said later in cross-examination that Mr El Chaar had earlier told her parents that he was thinking of marrying her. Her parents had to agree or disagree with that proposal. They agreed. That occurred about a year before they married. Mrs El Chaar said that she did not have to agree to marry him and had to be certain that she wanted to do so. All parties then waited on her decision. She was certain some two months before they married.

55. Before she began seeing Mr El Chaar before her marriage to him, Mrs El Chaar said there would be family visits between her family and that of Ms Kanj. She would visit the family in New South Wales and there were close family ties. The relationship definitely changed when she started to see Mr El Chaar. Her uncle called her and said that he could see her with 500 other men but not with Abdul. He was going to get him out of the country. Mrs El Chaar said that she thought that there was ill feeling when Mr El Chaar did not complete the marriage with Ms Kanj. Ms Kanj's father, she said, only wanted money. If he did not have money then he could not have Nada, her uncle thought. Mrs El Chaar said that she was told this by her husband and by her grandmother. Her grandmother had told her that she could not wait

for Mr El Chaar to come back and for there to be a family. When her grandmother visited Lebanon, Mrs El Chaar had been so happy that she was there as she had not seen her for a few months. Mrs Charamand was staying with one of her daughters and Mrs El Chaar visited her there. She told her, Mrs El Chaar said, that she and her grandson were "*so lucky to marry each other*". His ex-wife had been a big show-off and he did not deserve that.

56. Mrs El Chaar said that she did not "*really*" know that Mr El Chaar had made initial applications to remain in Australia. She said that his initial visits had been social visits. They had not talked about those things. She had not known that Mr El Chaar was in Australia as a result of his marriage to Ms Kanj. He did not explain his immigration problems to Mrs El Chaar and she said that she never asked him. She just knew that there was a lot of conflict between him and Ms Kanj.

Mr El Chaar

57. Mr El Chaar said that he had been in Sydney with his wife about January, 1996. They were not then married and he had seen his uncle and a friend of his uncle's. His uncle became angry and bashed him. He told him, Mr El Chaar said, that he did not want to see him in Sydney. As a result of this incident, Mr El Chaar said, he lodged his application for an apprehended violence order ("AVO"). Shortly afterwards, Ms Kanj lodged her application but there had been no contact at all between the time he lodged his application and she lodged hers. He denied that he had driven past her place of work and made threats against her or that he had telephoned her. Mr El Chaar said that he had not seen her since two or three days after he left his uncle's house after the ceremony was cancelled.

58. Mr El Chaar said that he withdrew his application for an AVO as he had talked to his family about it. His family had thought that there should not be an AVO against another family member. His grandmother, another uncle and Mrs Salem had spoken with him about it. Mr El Chaar said that he withdrew his application but Ms Kanj did not withdraw hers.

59. As to the relationship with his grandmother, Mr El Chaar said that he had been present when a video had been taken of his grandmother in Lebanon (Exhibit E). When he heard that his grandmother was visiting Lebanon, he and his wife went to see her at his aunt's house where she was staying. His grandmother was happy to see them, he said, and told them that she hoped to see him in Australia as soon as possible. The video was not taken at that time but on a later occasion. His wife had been present but not the children. After the video had been made, he and his wife went with his grandmother and aunt to look for a house for his grandmother to buy. He did that, Mr El Chaar said, at his grandmother's request. On another occasion, he and his wife had a meal at his aunt's house with his grandmother. His grandmother never said that she was scared of him. His aunt never stopped him from visiting her house.

60. Mr El Chaar said that he started to see Mrs El Chaar when he was staying at Mrs Salem's house. Mrs El Chaar would visit her grandmother at Mrs Salem's house and so see him, he said. She would visit each day to take her grandmother shopping. At first, he saw her as his cousin. His view of her changed before he went to court.

61. Mr El Chaar said that he and his wife became engaged a year before they were married. When they decided to marry, they talked to her parents. When they married, they stayed for a month or two in Sydney before moving to Adelaide and then to Lebanon. Mr El Chaar said that he married his wife because he loved her. After they were married, he approached the Department as to how he could remain in Australia.

62. Mr El Chaar said in cross-examination that he and Mrs El Chaar had not talked about his immigration status until some time during their engagement. They talked about having more children from the time they were married. It is traditional to have two, three or four sons. Mr El Chaar said that he and Mrs El Chaar had talked about raising their son in Lebanon and in Australia. Although they had considered raising their children in Lebanon, it would be difficult to do that, he said. What the future held, he did not know but it would be a shame if his children were not in Australia.

Mr Ahkmit Kanj

63. Mr Kanj denied that there was any feud between him and his brother, who is Mrs El Chaar's father. They have met, shaken hands, kissed and sat next to him. If his daughter wants Mr El Chaar, then that is "OK".

Mr Toufic Kanj

64. Mr Kanj said that his relationship with his brothers in Sydney had previously been "*as brothers*". Since his daughter and Mr El Chaar have been together, their relationship has been "*not all right but OK*". He does not know why there has been a change but he knows that they were unhappy that his daughter and Mr El Chaar were together. They did not want Mr El Chaar in Australia after he broke up with Ms Kanj. Mr Kanj said that he told his brothers that Australia belonged to everyone and not just to them.

65. Mr Kanj said that he had been told by his mother that his brother had asked Mr El Chaar for money and told him that he should get it from his father in Lebanon. He acknowledged that he had not been present at any of the alleged discussions. When told that his mother now denies that any of this was said, he replied that he had known his mother for a long time and that she "*twists things around*".

Taking the children to Lebanon

Mrs El Chaar

66. Mrs El Chaar said that her former husband did not see his daughters for two or three years after he left for Lebanon. He then saw them on a couple of occasions for five or ten minutes only. On one of those occasions, he gave each of his daughters \$5.

67. Mrs El Chaar then obtained a Family Court order providing, in part, that, the children have contact with their father in Sydney at stipulated times both before and after their trip to Lebanon. She was given "*... liberty to take the children ... to Tripoli in Lebanon for a period not exceeding 6 months*" (T documents, page 584).

68. Mrs El Chaar said that she took the children to see their father. He saw them on three or four days. Although the Family Court order had said that she could take the children away from Australia for six months, Mrs El Chaar said that she kept them away for one year and three months. When asked whether she thought about the Family Court order and that she was in breach of it during this extended visit, Mrs El Chaar replied that she had thought about it but that the children's (paternal) grandmother said that she could. She thought that if it were all right with the children's father, it would be all right with the Family Court. Since their return, they have not seen their father.

The life of the children in Lebanon

Mrs El Chaar

69. Mrs El Chaar said that she did not like the conditions in Lebanon at all. It was too dirty and the children thought that it was very dirty. There was so much pollution, dirt and dust, she said. The children suffered from diarrhoea and vomiting as well as colds and flus. Medical care was difficult, Mrs El Chaar said, as it was so expensive and the doctors did not know what they were doing. It was completely different from Australia, she added.

70. There was no-one for her daughters to play with in Tripoli as the children were all in school. Her daughters could not go to a public school as they could not read or write Arabic. There were 36 children in the class and there was no time to teach them Arabic. They could not go to a private school as the cost of \$US2,000 for each of them was too expensive. Private tutors did not have time to take them. She had asked her sister in law, who was a school teacher, and she had asked one of her friends. Mrs El Chaar said that she did take her daughters to a play group so that they could be with other children.

71. The children, she said, were very scared. They were particularly so when the Israelis bombed the electricity station, which was some 20 minutes drive from their home. Tripoli, where they lived, was not part of the war zone and was six hours by road from the war zone.

Relationship of the children with Mr El Chaar

Mrs El Chaar

72. Mrs El Chaar said that the children refer to Mr El Chaar as "*Daddy*" and regard him as their father. They love him and show it by jumping all over him and pull his hair "*just*

like normal daughters and their father". He takes them everywhere. They have visited the snow and the parks.

73. When the children are not in Lebanon, Mr El Chaar keeps in touch every day. He asks them about their school, their friends and what they ate for lunch and tea. He says goodnight to them before they go to bed. Mrs El Chaar said that they are in touch by computer and have a video facility so that they can see each other.

74. Mrs El Chaar said that she receives a pension from Centrelink. In the couple of months prior to the hearing, she had received child support payments from her former husband. Those payments, amounting to \$21 each month, were paid through the Child Support Agency. In the past, she had not received any payments from him. If she is desperate, she asks Mr El Chaar for money and he sends it straight away. She does not ask for much, however, as she said that she knows how hard it is to make money in Lebanon. When he comes to Australia, she is looking to him to support her and her daughters. He is an electrical welder by occupation.

Mr El Chaar

75. Mr El Chaar said that his relationship with Joumana and Jenan was that of any father and his two daughters. Theirs was a genuine relationship. They love him and think that he is their father. When they lived in Lebanon, he saw them every day but now talks to them every day. They tell him about what they are doing at school, what they eat and what they do to help their mother. They sing to him and he sings to them as well.

76. In his statement, Mr El Chaar said of his relationship with Joumana and Jenan:

"While my wife and her daughters were in Lebanon during part of 1999 and 2000, we became a close and loving unit that developed strong bonds as a family. I was gratified to do all in my power to provide my wife and children with a secure and loving environment.

I am not the biological father of Joumana and Jenan, my wife's two daughters by her previous marriage, but I love those children as if they were my own and I know they love me. They treat me in every way as if I were their real father. My wife and I have become parents of a son, born some five weeks ago in Australia. I have not seen the child and my heart is breaking to see him and to hold him. The anguish I am suffering at the thought of not being able to support my wife at this crucial time after the birth of our son is nearly unbearable." (Exhibit B)

The birth of their son

Mrs El Chaar

77. Mrs El Chaar said that she and her husband had discussed having children. She said that she was expecting her first child with him while she was in Lebanon. When she picked up the refusal of his application from Beirut, she had been four or five months pregnant. When

it was suggested to her that she had not been pregnant when Mr El Chaar's earlier application had been refused, Mrs El Chaar said that she and her husband had been trying to have children ever since they were married. They were thinking of having 13 or 14 children. When asked why she had chosen to have another child when the future was so uncertain, Mrs El Chaar replied that she wanted to have something of her husband while she is here.

Mr El Chaar

78. Mr El Chaar said that he hears his son's voice and sees him on the webcam. He said that he opened his internet shop so that he could speak with his wife each day.

Future plans

Mrs El Chaar

79. If Mr El Chaar is not permitted to come to Australia, Mrs El Chaar said, she would not leave the children in Australia by themselves. She could not leave again. Their school work "goes down" and they get sick if they leave. They would be "so stressed out" if they left. As for her own plans, Mrs El Chaar said, she did not know what she would do. She had not thought about it. All the time, she has been thinking only positively about it. If her husband were refused a visa, she would keep fighting for him to come to Australia. She had not realised until she saw the second refusal of his migration application that matters were serious. In the past, she had thought that he would apply until he could come.

80. In her statement, Mrs El Chaar said that, should Mr El Chaar not be granted a visa, she:

"... will be forced to consider leaving my country, Australia, where I was born and which I love. Should I leave Australia, I could not bear the pain of knowing that I had forced my children, especially my two daughters who are aware of their surroundings and who love their relatives her (sic) in Australia, to leave the country and the extended family they love dearly. Indeed, my dilemma is further heightened because of my daughter's biological father, who has generally shown no interest in them and has tried at times to make life difficult for us, might well refuse to allow the girls to leave Australia." (Exhibit A)

Mr El Chaar

81. Mr El Chaar said that he was a qualified welder. At the time of the hearing, he had a shop dealing with computers and the internet. He did not own the shop. Before he had travelled to Australia on the first occasion, Mr El Chaar had worked in his father's shop in Lebanon. If he were permitted to return to Australia, he said, he would go to Adelaide. There, he would live with his father in law. He would find a job straight away and then a house for his wife and family. Mr El Chaar wants to live a normal life.

82. In his statement, Mr El Chaar said of his future plans:

"Since marrying my wife and becoming part of our close family unit I have endeavoured in every way I can to try and make up for the wrongs I have committed in the past. I believe I have succeeded in doing this and that I have gained the respect of many in my community by my hard work and commitment. I have set up a business in the telecommunications area, where I rent a shop and serve the public through the provision of facilities for emails, faxes and telephone calls and where I set up email addresses for members of the public. While I have not yet been able to make a lot of money from the business it has shown healthy growth. I enjoy the work and the challenge of making the business successful. Should I be allowed back into Australia to join my wife and family, I know I will be a useful and committed member of the community and will be able to provide financially for my wife and children.

I am a welder by trade and I have been offered work as a welder should I be allowed to go back to Australia. I am informed that there is a shortage of welders in Australia and tradesmen are eagerly sought by the Australian business community." (Exhibit B)

83. Mr El Chaar said that he accepted full responsibility for his past actions and continued in his statement:

"... I can assure you I will never again commit or be party to any unlawful acts in Australia. I have been taught a lesson which will stay with me forever. I will never again lie or deceive anyone for any reason and will show respect for the law at all times. While I realize that this might sound easy to say, had I any other way to prove that I am a reformed character, I would do so willingly.

I am filled with remorse when I think of the terrible suffering my wife and children are going through by not having me there with them in Australia. I am suffering greatly myself, fearful that I may never again get the chance to prove that I can be a good husband and father.

My wife and my family are innocent victims who are being made to suffer terribly because of my past actions. I offer my apologies and deep regret for past wrongs and I plead to be allowed to prove to you that I have the will and the capacity to make up for any past wrongs I have committed."

84. Acknowledging that, if successful, he would only be granted a provisional visa and would be assessed for a permanent visa some two years later, Mr El Chaar said:

... I can assure you that I will prove in that time that I am a law-abiding person who is worthy of gaining a permanent visa in Australia. Because of my unblemished police record in Lebanon, I have every confidence that I will have no trouble in obtaining a police clearance certificate, something that is required of those seeking permanent entry to Australia.

Since marrying my wife and becoming an integral member of our close family unit, I

believe I have become a reformed and much better person. She has supported and loved me despite all of the suffering she has had to endure because of my past wrongdoing. She is still suffering greatly and has great fears that we will never be allowed to be a part of the family unit we passionately want to be. Even if she were to return to Lebanon and make her future here with me, she will suffer great deprivation having to leave Australia, her home since she was born, and be deprived her close family. As a consequence, she will also deprive her daughters, who love Australia, of the care and love they receive from their grandparents and their large extended family." (Exhibit B)

Welfare of the children

Dr O'Neill

85. Dr O'Neill is a psychologist, who practises privately but who conducts interviews and assessments of children and families, prepares and presents reports to courts, assesses and counsels victims of crime and persons suffering from stress and/or depression and advises families on developmental issues in relation to child and adolescent management. She also holds, and has held various academic and public positions.

86. Dr O'Neill has prepared two reports. The first was dated 30 May, 1998 and the second 7 January, 2001. In preparing both of her reports, Dr O'Neill interviewed Mrs El Chaar and Joumana and Jenan. In preparing the later report, she also administered a family relationship test. That test consists of a number of statements, some of which are negative, some of which are positive and some of which are of not much consequence at all. A child, for example, is asked to name the persons who are closest in the family or to indicate a person like the person whom she would like to marry when she grew up. If a child thinks that no-one meets a particular description, she may mark "*Mr Nobody*". The test is intended to give a child a much greater range for the expression of her feelings than can be achieved in an interview. An interview can be an environment that is too challenging for a child to express her feelings. Only when a child is in a great state of anxiety or tension is the test not accurate.

87. In her report, Dr O'Neill summarised the responses of Joumana and Jenan to the test and in her interview with them as well as her interview with Mrs El Chaar. She then set out her conclusions:

"The children have made it clear that they are positively attached to Mr El Chaar and regard him as their father. They had lived with him for more than a year in Lebanon and recorded healthy memories of his relationship with them. On this occasion the children had the advantage of accompanying their mother and of becoming part of the El Chaar extended family, which seems to have been very successful. Although they can recall some happy memories of their time in Lebanon, these appear to revolve around situations with father. Jenan has been positive about father, but had been very strong in her statement about disliking Lebanon. Both child spontaneously offered positive remarks about their happy attachment to Mr El Chaar and reflected this in their work on the Family Relations Test.

The children have become very involved with the conditions of their revived life in Australia, which is natural to them. Back in Australia, the extended family situation and return to friends has taken their interest and has given them a lifestyle more in keeping with their needs, except for the absence of the father, a critical attachment figure.

According to mother, the children were disadvantaged in Lebanon, as they were not permitted to attend school, not being residents. There has thus been a significant gap in their formal education, which they must work to fill. Jenan is clearly finding this difficult. Social conditions for the children appear to have been less than satisfactory, compared with the style of life they could enjoy in Australia. The children have both recorded attachment to their maternal grandparents, especially to the grandfather, the figurehead in their close family society.

Mrs El Chaar was about to give birth to a son at the time of our interview. This new child will add further complexity to the situation if the father remains absent, as the mother will undoubtedly grieve and the girls will necessarily be affected eventually. It seems clear that the mother will be impelled to return to Lebanon with her children if her husband cannot join her.

From this history it could be concluded that the children would suffer social and educational disadvantage from such a move. They have a deep affiliation with the mother's extended family and they urgently require make-up educational programmes. The children also need the security of having a loving father figure, a feature which has apparently been missing from much of their earlier lives.

There does seem to be a sound argument for reuniting these children with their step-father, if this can be done in the society of Australia. Jenan and Joumana will probably always consider Abdul Elchaar as their psychological father. He has had time and opportunity to imbue them with faith in that respect and appears to have succeeded in gaining their trust and love. Their mother has wisely kept the children ignorant of the legal difficulties which have separated the family, but, should the current situation prevail, the children will certainly suffer significant confusion and grief at a separation which will seem to them incomprehensible." (Exhibit D)

88. In her oral evidence, Dr O'Neill said that the girls were not aware of their natural father at all. When asked who her father was, Joumana indicated Mr El Chaar, she said. Their mother gave her the impression that her daughters had not been very comfortable with their natural father.

89. When asked about the effect on the girls if they had no contact with their natural father and no father figure, Dr O'Neill replied that this could never be the case while Mr El Chaar was alive. If the question were intended to be framed in terms of proximity, then the girls would be very puzzled as to why Mr El Chaar were not with them. They have not been told about the "politics of the matter" and would become very confused. They would then find out why he was not with them and would grieve. Dr O'Neill said that she always taught the importance of

the father and daughter relationship and that relationship is very important to girls. They will miss that relationship if they cannot be with him. It could be psychologically damaging to them if they were not to have that relationship. They do have an attachment with their grandfather in Australia but that is another kind of attachment. It is her belief, Dr O'Neill said, that children should have a father or a father figure in their lives and particularly so if they can relate to that person and respect them. For girls, respect is the greatest thing in the father/daughter relationship.

90. When asked whether she could see the girls making an easy transition to Lebanon were they to move there, Dr O'Neill said that Jenan gave the impression that conditions were chaotic but Joumana accepted it because "*that was where Dad was*". Joumana is a much more accepting child than is Jenan. It was not possible for her to say that the transition would be easy for both would fret for their friends in Australia. It would be difficult for the girls to learn Arabic for, to learn another language, they needed to have a good grounding in their own. Neither has such a grounding. They have relations in Lebanon who are fond of them but, on balance, they belong in Australia, Dr O'Neill said.

91. The girls have an understanding of what they would miss in Australia. It is a risk to remove children from their social structure and what they see as theirs. It is especially a risk to remove them from their friends. Joumana would do her best to settle if that were to happen but Jenan would be likely to rebel. The girls need a secure connected family and their needs are not currently being met. If they were to go to Lebanon, their best interests would not be met.

92. If Mr El Chaar were not permitted to come to Australia, Mrs El Chaar would grieve for him. This is something that the children would have been made very aware of. That would be so even though her grief would be involuntary and Dr O'Neill thought that she would try to protect the girls from it. To date, she has not attempted to "*lay grief*" on the children. Mrs El Chaar is very devoted to her husband and aims to be with him wherever he is. That is particularly so now that she has a son. It is very difficult to know how the girls would view their brother who is the child of a distant father. As they grow up, they could blame that brother for the disruption in their life. If the children were taken to Lebanon, Dr O'Neill said, they would, at some stage of their lives, fret for their family and friends left behind in Australia. She thought that the children might find education difficult in Lebanon. She did not know in what way the girls would be accepted by the community in Lebanon.

93. If Mr El Chaar were to be permitted to come to Australia to join Mrs El Chaar and her children, Dr O'Neill considered that the children's belief in their father would not be destroyed by any problems that he might have had in the past. The children would not know the details of those problems. They would, however, need to be assured that they would not be disappointed by something that was out of their understanding. His deeds in lying to the Department would not affect their view of him. Their view would only be affected if he were false in his actions towards them. The girls' stability would depend upon how he became an Australian citizen, how he set himself up in employment and whether he behaved like the head of the family. In Australia, they would feel that they were altogether and travelling along together. On balance, Dr O'Neill considered that the girls would probably be much better off if they were to stay in Australia rather than if they moved to Lebanon. She considered that was

probably the best option for the whole family as well. It was better than if Mr El Chaar were to be in Lebanon and the rest of the family in Australia.

94. If Mr El Chaar were to come to Australia and then "turn off" emotionally with the children, Dr O'Neill considered that the children would be able to compensate for that because they had their mother. At the same time, they would be shocked, confused and disturbed. If it were to happen, Mr El Chaar would have to answer to his wife's family. Dr O'Neill imagined that her parents would be very astute in picking up the feelings of their daughter and grand daughters. It would be a very complicated situation. The presence of a son also makes the situation very complicated. Fathers do not want to give up sons; there is some sense of ownership in sons. The girls have a lot of hope and trust in Mr El Chaar and, if that is misplaced, it would be very hard for them to ever trust any man apart from their grandfather.

95. Dr O'Neill also considered the girls' interests were their mother to live in Lebanon with and they to stay in Australia with their maternal grandparents. Taking into account the manner in which their education appears to have lagged, Dr O'Neill suspected that they had fretted for their mother when she left them and joined her husband in Lebanon. If she were to leave them again and, possibly take their brother, they would be devastated and would probably beg her not to go. Dr O'Neill did not think Mrs El Chaar capable of leaving her daughters behind but added, "*who knows?*".

96. Dr O'Neill was also asked about the effect on the girls of their living part of the time in Lebanon with their mother, brother and Mr El Chaar and part of the time in Australia with their mother and brother. She replied that the effect would depend upon whether or not the girls regarded the time in Lebanon as a holiday. Their mother would do her best to settle them down but, as the girls are "*so Australian*", there would be ongoing difficulties. Those difficulties would probably be greater for Jenan than for Joumana. It would be a very difficult situation. In cross-examination, Dr O'Neill said that Mrs El Chaar could take steps to soften the transition to Lebanon for her daughters and son. In taking those steps, she could get help from within her family. The steps would include addressing educational and emotional problems.

97. Issues of violence were also explored by Dr O'Neill. She said that the best indicator of whether violence will occur in the future is whether violence has occurred in the past. She did not know all of the circumstances of the allegations that Mr El Chaar had been violent to his grandmother. If he were to come to Australia and no longer be gentle to the children, the family would quickly degenerate. If it were to occur in Lebanon, Mrs El Chaar could extricate herself from that country legally but not emotionally. If there were to be family degeneration for that reason, it would be better if it were to occur in Australia and not in Lebanon.

98. When writing her second report, Dr O'Neill found that Joumana was much the same as she was at the time of writing her first. Jenan, though, had grown rather assertive with very strong opinions and likes and dislikes. That was not a trait she had noticed at the earlier time. She was putting herself at risk with her rigid thinking. That trait could foreshadow problems for her future if it were not carefully managed.

99. The position of Mr and Mrs El Chaar's son is somewhat different. He is still too young to be cognisant of his father yet. If he were to live in Australia and not get to know his father, he would miss significant aspects of his developmental needs. It is important for a boy to feel that he has not been abandoned by his father. The best relations, Dr O'Neill said, are made before a person is two years of age. During those years, anyone's presence is critical. A child of this age attaches to those persons who attract them and who are in keeping with his or her emotions. Lifelong attachments are formed unless the person terribly disappoints him or her. If a person has a comfortable deep attachment when very young, it is one of the most important things to found stability. A boy, who did not have his father, would miss the deep attachment to a "*father who would be a model for behaviour for life*". In the circumstances, he would also pick up habits of anxiety and fear in his earliest years. This makes a child's earliest years more and more important. How a particular child will deal with trauma, difficulties and anxiety is difficult to know. By the time that he or she is two years of age, it will show if he or she has had to deal with too much anxiety and difficulties to cope with. They will be out of control and will need a lot of mending if they mend at all. It cannot be assumed that Mr and Mrs El Chaar's son will always have his maternal grandfather as a role model. Dr O'Neill did not know which uncle he would choose to follow. He may grow up in some sort of confusion as to his cultural heritage.

CONSIDERATION

Framework of Act

100. Under the Migration Act, the Minister may grant visas either to travel to and enter Australia or to remain in Australia or to do both. There are classes of visa (**s. 31(1)**). Some are specified in the Act itself and some are prescribed in the Regulations (**s. 31(2)**). The Regulations may prescribe criteria for a visa or for a visa of a specified class (**s. 31(3)**). For the purposes of this case, the prescribed criteria for the grant to a person of a visa of a particular class are found in the primary criteria (and secondary criteria, if any) set out in the relevant Part of **Schedule 2** to the Regulations. Among the primary criteria that must be satisfied for a Partner Provisional Visa is that, at the time the decision is made, the person satisfies the requirements of public interest criterion 4001 as specified by **cl. 309.225** of **Part 309** of **Schedule 2** of the Regulations. **Schedule 4** sets out the public interest criteria.

101. At the time that the delegate's decision was made, criterion 4001 provided that:

"Either:

- (a) the applicant satisfies the Minister that the applicant passes the character test; or*
- (b) the Minister is satisfied, after appropriate enquiries, that there is nothing to indicate that the applicant would fail to satisfy the Minister that the person passes the character test; or*
- (c) the Minister has decided not to refuse to grant a visa to the applicant despite reasonably suspecting that the applicant does not pass the character test; or*

- (d) *the Minister has decided not to refuse to grant a visa to the applicant despite not being satisfied that the applicant passes the character test."*

102. **Section 501(1)** of the Act provides that:

"The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test."

103. The "*character test*" is set out in **s. 501(6)**, which provides that:

*"For the purposes of this section, a person does not pass the **character test** if:*

- (a) *the person has a substantial criminal history (as defined by subsection (7)); or*
- (b) *the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or*
- (c) *having regard to either or both of the following:*
 - (i) *the person's past and present criminal conduct;*
 - (ii) *the person's past and present general conduct;**the person is not of good character; or*
- (d) *in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:*
 - (i) *engage in criminal conduct in Australia; or*
 - (ii) *harass, molest, intimidate or stalk another person in Australia; or*
 - (iii) *vilify a segment of the Australian community; or*
 - (iv) *incite discord in the Australian community or in a segment of that community; or*
 - (v) *represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.*

*Otherwise, the person passes the **character test**."*

The Direction

104. Pursuant to **s. 499**, the Minister may give written directions to a person or body about the performance of functions or the exercise of powers under the Act. The person or body must comply with those directions which must not be inconsistent with the Act or the regulations

made under it. On 16 June, 1999, the Minister made directions under **s. 499** for the guidance of decision-makers in making decisions to refuse or cancel a visa under **s. 501** of the Act ("the Direction").

105. In commenting generally upon his power to refuse or cancel a visa, the Minister stated in the Preamble:

"In exercising this power, the Minister has a responsibility to the Parliament and to the Australian community to protect the community from criminal or other reprehensible conduct and to refuse to grant visas, or cancel visas held by non-citizens whose actions are so abhorrent to the community that they should not be allowed to enter or remain within it.

... When a visa applicant or a visa holder does not pass the Character Test, decision-makers will decide whether to refuse the application or to cancel a visa. Exercise of this discretion will take into account a wide range of factors including the expectations of the community, the nature of the crimes committed, the non-citizen's links to Australia and any relevant international law obligations."

106. The Minister goes on to give a direction as to the purpose for which the powers of refusal or cancellation were given by the Parliament in enacting **s. 501** when he said:

"The purpose of refusing or cancelling a visa under section 501 is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the Australian community as a whole as to who should be allowed to enter or remain in the community."

Character test

107. The direction is then divided into two: the application of the character test and the exercise of the discretion. Taking first the application of the character test, the Minister deals with each of the four grounds specified in **s. 501(6)**. In introducing the directions regarding that paragraph, the Minister states:

"1.7 Under paragraph 501(6)(c), decision-makers are required to make a finding that a non-citizen is 'not of good character' on account of the non-citizen's past and present, criminal or general conduct and thereby does not pass the Character Test. In reaching the conclusion that the non-citizen is not of good character, decision-makers must take into account all the relevant circumstances of a particular case, including evidence of rehabilitation and recent good conduct."

108. Only **s. 501(6)(c)(ii)** is relevant in this case and, with regard to that, the Minister directed:

"1.9 In considering whether a non-citizen is not of good character against subparagraph 501(6)(c)(ii), decision-makers should consider the following matters

(where they are relevant to the fact of the particular case), and where they are relevant, would, in the absence of any countervailing factors, constitute a failure to pass the Character Test:

- (a) whether the non-citizen has been involved in activities indicating contempt, or disregard, for the law or for human rights. This could include, but need not be limited to:*
 - engaging in business activities which fall short of criminal fraud requiring proof beyond reasonable doubt, but which, on a more likely than not basis, are disreputable and reflect poorly on a non-citizen's moral qualities; continual evasion or non-payment of debt;*
 - continual disregard as to payments of family maintenance;*
 - involvement in activities such as organised crime, terrorism,*
 - drug related activities, political extremism, extortion, 'white' collar crime, fraud, breaches of immigration law; or*
 - involvement in war crimes or crimes against humanity.*
- (b) whether the non-citizen has, in connection with any application for the grant of a visa or any kind of Government benefit, provided a bogus document or made a false or misleading statement;*
- (c) whether the non-citizen has ever made a false or misleading declaration on an approved form, as defined in subsection 5(1) of the Act, about the non-citizen's character or conduct or both;*
- (d) whether the non-citizen has been removed/deported from Australia or removed/deported from another country; or*
- (e) whether the non-citizen has been dishonourably discharged from the armed forces of any country or discharged prematurely as the result of disciplinary action in circumstances, or because of conduct, which would be regarded as serious in Australia.*

1.10 ...

1.11 General conduct also includes recent good conduct. Any good acts of the non-citizen after reprehensible conduct are indications that the non-citizen's character may have reformed. Thus, both good and bad conduct must be taken into consideration in obtaining a complete picture of the non-citizen's character. However, where the decision-maker is not fully persuaded that the non-citizen has reformed, the discretion to refuse or cancel a visa is enlivened, and evidence of good acts and recent conduct becomes relevant to the exercise of the discretion (see Part 2)."

109. In this case, the focus is upon Mr El Chaar's past and present general conduct as set out in **s. 501(6)(c)(ii)** rather than upon the other criteria in that provision. That requires a

consideration of what is meant by the expression "general character". It was considered in *Re Lachmaiya and Department of Immigration and Ethnic Affairs* (1994) 19 AAR 148 where Deputy President McMahon said that:

" 'Good character' cannot have the meaning commonly attributed to it in criminal trials. In that context, it usually means absence of convictions or, at most, absence of adverse police notice. The distinction drawn in the two subparagraphs between criminal and general conduct supports the view that here, good character does not have the narrow criminal law meaning. There are many cases dealing with prohibited references to bad character and the effect on trials when evidence of that nature is allowed before a jury. In the present context, it is more likely that good character was intended to be given a broader meaning.

The Macquarie Dictionary defines character as '1. the aggregate of qualities that distinguishes one person or thing from others; 2. moral constitution, as of a person or people; 3. good moral constitution or status; 4. reputation; 5. good repute; 6. an account of the qualities or peculiarities of a person or thing.' In assisting the Minister to determine whether a person has a good aggregate of qualities, as distinct from a bad one, regard should be had to the structure and purpose of the legislation." (pages 154-155)

110. After considering that structure and purpose of the Act and particularly that of s. 20, Deputy President McMahon noted that emphasis is given in s. 20(1) to the giving of false information and concluded that:

"These are overall requirements important in the administration of immigration procedures. The observance of truth in dealing with officials in migration matters (particularly where the truth is known only to the person making the statement) is of fundamental importance to the control mechanism which this country exercises in visa applications when dealing with the many reasons for coming to Australia. To lie consistently, as Mr Lachmaiya has over a period of years, is to subvert the administration and, in the context of the Act, to demonstrate that Mr Lachmaiya is not a person of good repute or good character. Australia can have no confidence that he would not again transgress in matters where truth and good faith could be deceptively withheld." (pages 155-156)

111. A similar approach was adopted by Deputy President Forrest in *Wasu Deo Naidu and Department of Immigration and Ethnic Affairs* (unreported, 27 September, 1994, Decision No. 9753) and Deputy President McDonald in *Ragni Mala Prasad and Minister for Immigration and Ethnic Affairs* (unreported, 7 November, 1994, Decision No. 9822) and *Wasu Deo Naidu and Department of Immigration and Ethnic Affairs* (unreported, 2 May, 1996, Decision No. 10910). In *Prasad*, Deputy President McDonald added:

"A decision about whether a person is of good character requires a consideration of an aggregate of qualities. It is true to say, however, that, despite the many good qualities possessed by a person, those qualities can be outweighed by a single adverse incident if it is of sufficient weight and seriousness." (paragraph 7)

112. What is meant by the expression "good character" was also considered by the Full Court of the Federal Court in *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84 (Davies, Lee and Nicholson JJ). While each rejected the notion that good character referred to a person's reputation or repute, Lee J expressed that to which it does refer in the following passage:

"Unless the terms of the Act and regulations require some other meaning be applied, the words 'good character' should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not to the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact while the latter is a review of subjective public opinion ...

...

Notwithstanding the breadth of the disqualifying elements of the prescribed criteria, the purpose of reliance upon the concept of good character in the regulations is of importance. Common sense suggests that the Act and regulations are not concerned with infractions or patterns of conduct that show weaknesses or blemishes in character but with ensuring that the exercise of a sovereign power to prevent a non-citizen entering Australia is only invoked when the non-citizen is a person whose lack of good character is such that it is for the public good to refuse entry." (page 94)

113. Finally, regard should be had to the judgement of the Full Court of the Federal Court in *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321 (Spender, Drummond and Mansfield JJ). Speaking generally of s. 501, the Full Court said that it:

"[8]... does not charge the decision-maker with the task of making a judgment, general in nature, about the character of a person, ie, a judgment to which the statutory context is of no relevance. The concept of 'good character' in s 501 is not concerned with whether an applicant for entry meets the highest standards of integrity, but with a less exacting standard than that. It is concerned with whether the applicant for entry's character in the sense of his or her enduring moral qualities, is so deficient as to show it is for the public good to refuse entry. The standard is, moreover, not fixed but elastic, in the sense that identified deficiencies in the moral qualities of an applicant for a short-term entry permit may not justify the conclusion that he is 'not of good character' within s 501(2), while similar deficiencies may suffice to justify that conclusion, where the person seeks long-term entry." (page 324)

"[24]... Even though the appellant sought a long-term entry permit, the tribunal may well have set too high a standard in determining, on the basis upon which it acted, that he was not a person of good character: it appears to have concentrated, in making this finding, on considerations showing a lack of the highest integrity on his part, without making any attempt to test the deficiencies it identified in his conduct against the level of harm to the public good that would be presented by his admission into the Australian community on a

permanent basis. However, no challenge being made to the tribunal's decision on this ground, so it is unnecessary to pursue this question." (page 327)

Does Mr El Chaar pass the character test?

114. On the facts of this case, whether Mr El Chaar passes the character test depends upon whether or not he is a person not of good character within the meaning of s. 501(6)(c). This is a matter that has caused me some grave concern. On some important issues, the evidence is in stark conflict. On the one hand, is painted the picture of the well-intentioned person who was deeply in love with his first wife, Ms Kanj, but who was not permitted to complete the traditional and religious marriage ceremony so that he could be recognised as her spouse in the Islamic community. Permission was denied because he could not meet unreasonable demands for money. He is now married to a person he loves deeply and is in a father role to her daughters. They have a son and he yearns to be with them so that he can be a father and husband. That is the view put forward by Mr El Chaar and supported on the basis of hearsay evidence by Mrs El Chaar's father, Mr Toufic Kanj, and Mrs El Chaar. On the other hand, is painted the picture of the person who married Ms Kanj solely for the reason of obtaining the Australian marriage certificate so that he could stay in Australia permanently. That person was not asked for money or, if he was, was asked only for a token amount of a dollar, or perhaps \$20, to formalise the agreement to marry. Once he had the marriage certificate, he exhibited no interest in working or looking for work. He was alleged to be violent towards his grandmother and there were suggestions that he had some hand in the fire at his grandmother's house. That picture is painted by Mr Ahkmit Kanj and Mrs Charamand as well as by Ms Kanj and Mrs Charamand in the documentary material.

115. Where the truth lies in such matters is extremely difficult to ascertain. Mrs El Chaar, I find is deeply attached to Mr El Chaar. Her view of him could be thought to be coloured by that attachment. I also find that, wherever the truth of the matter lies, the disintegration of the marriage arrangement between Mr El Chaar and Ms Kanj was extremely acrimonious. Relations between Mr El Chaar and her family, which is also part of his extended family, remain acrimonious even though Ms Kanj has since married another man from Lebanon. The view of Ms Kanj and her family of Mr El Chaar could be thought to be coloured by that acrimony. I find that Mr El Chaar has made numerous attempts to obtain a visa to remain in Australia. That in itself does not reflect one way or another on him. The pattern and history of those attempts might, however, be thought to indicate a desire to achieve his intention to remain at all costs and so not be honest in his stated intentions either to the Minister and his Department or to Mrs El Chaar and her children.

116. In the midst of allegations and counter allegations and good and bad reports of his actions and motives, one thing is clear. That is that Mr El Chaar was convicted of making a false statement contrary to s. 234 of the Act. That was a statement to the effect that he lived with Ms Kanj in a marital relationship at Punchbowl from October, 1994 until December of that year. It was not an isolated statement but a statement made in his application for permanent residence based on his marriage to Ms Kanj and repeated in statements during interviews with officers of the Department. He admitted making those statements and he pleaded guilty. His

explanation that he was emotionally broken and not thinking properly because he did not want to lose his wife does not sit well with his saying that he relied on the advice of Mrs Salem because she said that she knew about migration law. His attempt to put the blame onto Mrs Salem points to his efforts being directed to obtaining the right to remain in Australia rather than being the misguided and misdirected efforts of the broken-hearted.

117. Also pointing in that direction is Mr El Chaar's initial visit to Australia. He gave as his reason for visiting Australia, his wish to visit his family. That was true but he also acknowledged in cross-examination that his family in Lebanon had given him permission to marry Ms Kanj should he and she like each other when they met. On the basis of his evidence, I also find that his uncles in Australia wanted him to consider marriage to their daughters as well. Taking into account his evidence and subsequent events, I am also satisfied that his visit to Australia was not simply to visit family but to visit family with a view to considering marriage to Ms Kanj or one of her (and his) cousins.

118. I am also satisfied that Mr El Chaar came to Australia intending to remain in Australia if he could. I have reached that conclusion from the pattern of events which, in isolation, might be thought not to have that intention. It begins with his overstaying his initial TEP visa after it had been extended on two occasions and then lodging, on 28 May, 1993, his application for refugee status. On the one hand, he states that he saw Ms Kanj and fell in love with her and wanted to get married. On the other, he states that a person has to be ready for marriage and that he was not when he lodged his application for refugee status. Matters such as a wedding and furniture had to be arranged. At that time, Ms Kanj was only 17 years of age. Her youth could have been an explanation for delaying marriage but it was not one given by Mr El Chaar. He did not return to Lebanon while the arrangements were put in place and at least one of those arrangements, an engagement between him and Ms Kanj, was not made until 5 March, 1994. That was after he had received notice that the decision to refuse his application for refugee status had been refused.

119. The next event in the pattern is the making of the false statements to which I have already referred. This is followed by Mr El Chaar's application for a visa based on his having to assist his grandmother. The circumstances surrounding this application are again surrounded by conflicting evidence. His grandmother at first supported the application and then withdrew her support less than three weeks later. Mrs Charamand gave evidence but I have neither summarised it nor taken it into account as it was marred by difficulties in communicating with her. Those difficulties were caused in part by her giving evidence over the telephone through an interpreter, her difficulty in hearing and uncertainties as to whether or not she was assisted in giving her answers by a person or persons in the room with her. What is clear is that Mr El Chaar's application, lodged on 26 July, 1995, followed closely on the heels of the refusal on 11 July, 1995 of his visa based on his marriage to Ms Kanj.

120. The next event in the pattern concerns the meeting and marriage of Mr and Mrs El Chaar. Mr El Chaar states that his view of Mrs El Chaar changed from that of his cousin to a person he saw as his future wife before the court case leading to his conviction on 19 January, 1996. He said that they decided to marry a year before they did marry on 9 December, 1996. Mrs El Chaar, however, said that he had asked her to marry him a couple of months before they

married and that they did not discuss the issue before then. If she is correct, then that would mean that the subject of marriage was not discussed until September or October, 1996. This was shortly after the decree nisi for his divorce from Ms Kanj would have become absolute and while his application for review of the decision to refuse his application for permanent residence visa was under consideration. He did not withdraw it until February, 1997 and so after his marriage and the day before he left Australia on the last occasion.

121. If Mr El Chaar is correct, then he spoke to Mrs El Chaar about marriage as early as December, 1995. If that is the case, then it raises the question whether he made his application based on his grandmother's special needs simply to extend the time that he could remain in Australia rather than on the basis of his grandmother's interests. The fact that he not only continued with his application after his grandmother withdrew her support but also applied for review of the decision to refuse his application, suggests that his application was a tool to extend his stay in Australia. His reasons for doing so were not enunciated at the hearing but could have been based on his wish to marry.

122. The final event in the pattern relates to what Mr El Chaar told Mrs El Chaar about his migration status before they were married. I accept her uncontradicted evidence that he had told her that it was nearly finished and that everything would be "OK". That was a couple of months before their wedding and, at that stage, everything was far from "OK" and far from being finalised. In saying this to her, I find that Mr El Chaar misled his wife. I make that finding even though Mrs El Chaar sought to justify his not giving her any details about his status on the basis that she did not know anything about migration law.

123. This pattern leads me to conclude not only that Mr El Chaar intended to remain in Australia once he was here but that he would do so without regard to others he used in the meantime and without regard to their interests. His readiness to rely on his marriage to Ms Kanj even when he knew that it was a marriage in name only, his readiness to rely on the special needs of his grandmother when she had withdrawn her support for his application support this conclusion and his readiness to keep Mrs El Chaar ignorant of his migration problems before their marriage support this conclusion. Mr El Chaar's conduct also reveals a disposition to place his personal interests above the interests of others. Mrs El Chaar speaks of a caring husband and father. Even if he is, and I will return to this, it does not take away from the fact that he has demonstrated a disposition to treat people other than his present wife and her daughters in an uncaring fashion.

124. Having regard to Mr El Chaar's overall pattern of behaviour, I find that he has been in breach of his wider duty to the Australian community to abide by the law. While it is legitimate for a person to take every step he or she may legally take to achieve an outcome, there is an expectation that those steps will be attended by integrity and honesty. Mr El Chaar has not acted honestly, as I have already found, in relation to the pursuit of his application based on his marriage to Ms Kanj and has not acted with integrity in relation to his claim based on his grandmother's needs. Furthermore, he has not acted with integrity to Mrs El Chaar whether or not she sees it in that light. In the context of the Act, it seems to me that the need for honesty and integrity in each individual is very important in the administration of Australia's migration laws. Unless each applicant shows honesty and integrity it is much more difficult to ensure that

all applicants for entry are treated fairly and that their claims for entry are assessed by the same standards. It is for the public good, when viewed both internationally and domestically, that fairness and equity are maintained when there are many wishing to enter Australia and there are standards to be met. Fairness and equity are of such importance that it seems to me that I must conclude that the traits Mr El Chaar has shown outweigh any good traits he may have shown in being a caring husband and father and in the efforts he has made in Lebanon to re-establish himself and not to engage in any criminal activity. Consequently, I find that, for the purposes of the Act, he is not of good character.

The discretion

125. Turning to the exercise of the discretion should a person fail to pass the character test, the Minister has directed that there are both primary and other considerations to which a decision-maker should have regard. Decision-makers are directed to:

"... note that no individual considerations can be more important than a primary consideration, but that a primary consideration cannot be conclusive in itself in deciding whether to exercise the discretion to refuse or to cancel a visa. Decision-makers must have due regard to the importance placed by the Government on the three primary considerations, but should also adopt a balancing process which takes into account all relevant considerations." (Direction, paragraph 2.2)

126. The three primary considerations are:

- "(a) the protection of the Australian community and members of the community;*
- (b) the expectations of the Australian community; and*
- (c) in all cases involving a parental relationship between a child or children and the person under consideration, the best interests of the child or children."*

127. The Minister then deals with each primary consideration in turn. The consideration of the protection of the Australian community requires me to consider three factors: the seriousness and nature of Mr El Chaar's conduct; the likelihood that he will repeat it; and whether visa refusal might prevent or discourage similar conduct in the future.

128. Of particular significance in relation to the seriousness and nature of Mr El Chaar's conduct, I must have regard to:

- "(c) serious crimes against the Migration Act 1958, including, but not limited to, offences attracting a sentence of imprisonment of 12 months or more for bringing non-citizens into Australia in contravention of the Act; or to harbour unlawful non-citizens; arranging a contrived marriage, de facto relationship or interdependency to obtain permanent residence; or providing certain false or misleading information about a marital, de facto or interdependency relationship, applying or nominating for permanent residence on the basis of a contrived*

marriage, de facto relationship or interdependency relationship; or using or possessing a visa granted to another person; or presenting false or forged documents or making a false or misleading statement in connection with entry or stay in Australia." (paragraph 2.6)

129. In assessing such matters, regard must also be had to any relevant factors put forward by Mr El Chaar as mitigating factors (paragraph 2.8(a)). Regard must also be had to the likelihood that his conduct may be repeated and to the need to deter other people from repeating such conduct.

130. Consideration must be given to the expectations of the Australian community as they have been identified by the Minister as follows:

"The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is a significant risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application or cancel the visa held by such a person. Visa refusal or cancellation and removal of the non-citizen may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person would not be granted a visa or should be removed from Australia. ..." (paragraph 2.12)

131. In relation to the third primary consideration, the Minister stated that, in general terms, a child's best interests are served if he or she remains with its parents. Countervailing considerations include, but are not limited to:

- "(a) any evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; or*
- (b) any evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct."* (paragraph 2.15)

132. The matters to which the Minister has directed a decision-maker's attention in considering the best interests of the child are:

- "(a) the nature of the relationship between the child and the non-citizen;*
- (b) the duration of the relationship including the number and length of any separations and reason/s for separation; the hypothetical prospect for developing a better/strong relationship in future (whether or not there has been significant recent contact) would normally be given relatively less weight than the proven history of the relationship based on past conduct;*
- (c) the age of the child;*
- (d) whether the child is an Australian citizen or permanent resident;*

- (e) *the likely effect that any separation from the non-citizen would have on the child;*
- (f) *the impact of the non-citizen's prior conduct on the child;*
- (g) *the time (if any) that the child has spent in Australia;*
- (h) *the circumstances of the probable receiving country, including the educational facilities and the standard of the health support system of the country to which the child may have to go, or return to, should the non-citizen not be permitted to enter or remain in Australia;*
- (i) *any language barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children acquire new languages; and*
- (j) *any cultural barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children adapt to new circumstances."* (paragraph 2.16)

133. In looking at the best interests of the child, regard must also be had to the High Court's judgement in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, Mason CJ, Deane, Toohey and Gaudron JJ, McHugh J dissenting). The Court was concerned with the relevance of the United Nations Convention on the Rights of the Child ("the Convention") in making administrative decisions under the Act. Articles of that Convention with particular relevance in this case state:

"Article 3

- 1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- 3. ...

Article 9

- 1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the*

child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. *In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*
3. *...*
4. *...*

Article 18

1. *States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*
2. *For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities ...*
3. *..."*

134. The majority in *Teoh* accepted that the Convention, which was ratified by Australia on 17 December, 1990 and which had come into force for Australia on 16 January, 1991, had not become part of the municipal law of Australia. They rejected a submission that its absence from the municipal law meant that it could never give rise to a legitimate expectation. The majority continued:

"No persuasive reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law are a less than compelling reason – legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, (See Minister for Foreign Affairs and Trade v Magno (1992) 37 FCR 298 at 343; 112 ALR 529; Tavita v Minister of Immigration [1994] 2 NZLR 257 at 266) particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a

legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention (cf Simsek v MacPhee (1982) 148 CLR at 644) and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it." (page 365)

135. The Minister has recognised that there are considerations, other than primary considerations, which may be taken into account. As each of those other considerations is given less weight than is given to the primary considerations, I will return to them later in these reasons. Before doing so, I should mention the manner in which I am required to consider primary considerations. This was considered by the Full Court of the Federal Court in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, 18 May, 2001 (unreported, Branson, North and Stone JJ) in the context of the primary consideration relating to the best interests of the children. The Full Court said:

"32 *An identification by the Tribunal of what the best interests of Mr Wan's children required, and a recognition by the Tribunal of the need to treat such interests as a primary consideration, would not have led inexorably to a decision by the Tribunal to adopt a course in conformity with those interests. That is, even had the Tribunal concluded that the best interests of the children indicated that Mr Wan should be granted a visa, it was legally open to it to refuse to grant Mr Wan a visa. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of Mr Wan's children, it was entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children. However, it was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.*

33 *The written reasons of the Tribunal suggest that it regarded the expectations of the Australian community as a primary consideration (indeed, it might be thought, the primary consideration) in the exercise of the discretion to grant or to refuse to grant Mr Wan the visa for which he had applied. The Tribunal was entitled to regard the expectations of the Australian community as a primary consideration provided that it did not overlook that, on the procedure which it had adopted, procedural fairness demanded that it act on the basis that the best interests of Mr Wan's children were a consideration of equal significance (ie also a primary consideration). So, for example, the Tribunal might have concluded that the best interests of Mr Wan's children required that Mr Wan be granted the visa, but that the damage to their interests that would flow from his being refused the visa would be of only slight or moderate significance. If the Tribunal had also concluded that the expectations of the Australian community were that a non-citizen who engaged in conduct of the kind engaged in by Mr Wan would not be granted a visa, and that a decision to grant such a visa would be a most serious affront to the*

expectations of the Australian community, it would have been entitled to conclude that, in the circumstances of the case, the best interests of the children were outweighed by the strength of community expectations."

136. I will consider first the primary consideration relating to the protection of the Australian community. It does not follow from my finding that Mr El Chaar's past actions in regard to his remaining in Australia were not consistent with the public good in so far as the administration of its migration laws are concerned, that refusing him a visa is necessary for the protection of the Australian community. Whether it is necessary, is dependent in the context of this case upon whether he is again likely to break its laws and disregard the interests of others in order to advance his own interests. On one view, if he is permitted to come to Australia on a permanent basis, he will have achieved what he set out to do. On another view, it could be said that he is continuing to disregard the interests of others and is simply using Mrs El Chaar and her children to further his ends. Having shown a past propensity for such behaviour, he is likely to do it again.

137. Again, the evidence is confused. Mrs El Chaar speaks very highly of her husband and I accept that she believes what she says. She is very taken with him and I consider that she is genuine in her feelings for him. At the same time, she states that she will do anything to bring him to Australia. That brings me to the birth of their son in February, 2001. He was born on 2 February, 2001 and so was conceived in April or May, 2000. That was at or about the time at which he lodged his most recent application for a Provisional Spouse Visa on 29 May, 2000 and after his application for the same class of visa had been lodged and a decision made on 13 March, 2000 to refuse it.

138. Mrs El Chaar said that she chose to have her son, even though the future is uncertain, because she wants to have something of her husband in Australia. While I accept her evidence and also accept that a child may be important to Mr El Chaar, the timing of his conception is a cause for concern in this case. I have found that Mr El Chaar has previously demonstrated a pattern of using others for his own purposes. While it may be thought to be hard-hearted to suggest that he is demonstrating the same pattern in choosing to have a child of his own, the timing and the fact that the child is also an Australian citizen is certainly consistent with his previous pattern. Mrs El Chaar said that she and her husband had been trying to have children since they were married. If that is so, it would mean that the timing of their son's conception is not relevant in determining whether or not Mr El Chaar is following his previous pattern of behaviour. The fact that he was trying to have children at all in the circumstances of uncertainty remains, however and it does nothing to suggest that he is no longer following that pattern.

139. Since Mr El Chaar returned to Lebanon, he has started his own business. That is to be commended as is his staying out of trouble with the law. He is not yet in a position where he is able to contribute to the maintenance of his family in Australia. That does not reflect on his character one way or the other.

140. What is in the best interests of the children is an extremely difficult question. I am satisfied, on the basis of the evidence of Mrs El Chaar and of Dr O'Neill, that Joumana and

Jenan regard Mr El Chaar as their father figure. They have not seen their natural father for a long time and he does not play a part in their lives. They have enjoyed happy times in Lebanon with Mr El Chaar and are, to use the words of Dr O'Neill, happily attached to him.

141. There is no question that the interests of children are generally best served if they are able to grow up in a stable environment under the care of parents who love them and have their best interests at heart. What is in the best interests of Joumana and Jenan is a very difficult issue to resolve and I have thought very long and hard about it. While their son is too young to have formed an attachment to any country or to any person other than his mother, their daughters are in a different category. I am satisfied that Joumana and Jenan enjoyed time spent with their mother and Mr El Chaar in Lebanon but, on the basis of the evidence of Dr O'Neill, am also satisfied that they did not enjoy Lebanon as such. They suffered from a lack of friends in Lebanon and that was brought about, in part at least, by their not being able to attend school. Mrs El Chaar explained that their inability was due to their not being able to speak Arabic and to her inability to afford private school fees. There can be no issue taken with her second reason but the first must be seen in context. Mrs El Chaar took her children to Lebanon in October, 1999. By this time, she had been married to Mr El Chaar for almost three years. She had spent a total of nine months, spread over two visits, in Lebanon and had had an opportunity to make enquiries about the education system. Between February, 1998 when she returned to Australia from her second visit and October, 1999 when she took her daughters to Lebanon, she had approximately 20 months to arrange for them to gain some familiarity with the language. Despite that time and despite planning to take them with her, she did nothing in this regard to assist their transition to Lebanon. Whether they would have found their stay in Lebanon easier and whether they would have been able to enter the education system had they had greater familiarity with the Arabic language remains an unanswered question.

142. On the basis of Dr O'Neill's evidence, I find that their best interests would not be met even if they were living in Lebanon and even if they were living with their mother and Mr El Chaar. They are Australian and are used to Australian ways. They would have great difficulty in adjusting to the life in Lebanon. That is particularly so in the case of Jenan, who has the more rebellious personality and is less adaptable to her circumstances than her sister.

143. If Mr El Chaar were not permitted to come to Australia and they were to remain in Australia with their mother without him, their interests would be adversely affected. They would be aware of their mother's grieving for her husband. Whether their best interests would be affected by his not being here is really dependent upon what he is likely to do if he were permitted to come. If he were permitted to come and then resorted to his previous pattern of using people for furthering his own interests, then their best interests would be served by his not being with them at all. Certainly, they would miss the presence of a father figure but they would also not be subjected to the betrayal of being abandoned if he were to follow his own best interests and those interests did not include a consideration of their welfare. It follows that a consideration of the children's best interests involves a consideration of what Mr El Chaar is likely to do in the future.

144. Before returning to that, I will set out the remaining considerations of which the Direction requires consideration. These considerations are considered by the Government to be

relevant but of less individual weight than the primary considerations. In so far as they are relevant in this case, they include:

- "(a) *the extent of disruption to the non-citizen's family, business and other ties to the Australian community;*
- (b) *genuine marriage to, or de facto or interdependent relationship with, an Australian citizen, permanent resident or eligible New Zealand citizen:*

in assessing the compassionate claims of the Australian partner (Australian citizen, resident or eligible New Zealand citizen), decision-makers must consider the circumstances under which the relationship was established and whether the Australian partner knew that the non-citizen was of character concern at the time of entering into or establishing the relationship;
- (c) *the degree of hardship which would be caused to immediate family members lawfully resident in Australia (including Australian citizens), including whether the immediate family members are able to travel overseas to visit the non-citizen, the nature of the relationship between the non-citizen and the immediate family members, whether immediate family members are in some way dependant on the non-citizen for support which cannot be provided elsewhere;*
- (d) *family composition of the non-citizen's family, both in Australia and overseas;*
- (e) ...
- (f) ...
- (g) ...
- (h) *any evidence of rehabilitation and any recent good conduct;*
- (i) *whether the application is for a temporary visa or permanent visa;*
- (j) *the purpose and intended duration of the entry to or stay in Australia, including any significant compassionate circumstances; and*
- (k) *the fact that a non-citizen has been formally advised in the past by an officer of the Department of Immigration and Multicultural Affairs about conduct which brought him or her within the deportation provisions at section 200/201 of the Act or the visa refusal and cancellation provisions at section 501."*

145. I am satisfied that the marriage between Mr and Mrs El Chaar is a genuine marriage in so far as Mrs El Chaar is concerned. While she knew that Mr El Chaar's migration status was not resolved at the time she married him, she would not have been aware at the time

that he was "*of character concern*" to the Minister at the time. His application for a special needs visa had not been refused on that basis at the time and refusal of subsequent applications on character grounds was to come later.

145. Mr El Chaar has applied for a Provisional Spouse Visa. That is a temporary, rather than a permanent, visa. If it were granted, then he would be required to apply for a permanent visa at a later stage and he would again have to satisfy the character test.

146. This matter has caused me great difficulty. I am not satisfied on the evidence to date that Mr El Chaar has given up his ways of using others to further his own best interests. Such behaviour is contrary to the best interests of the Australian community. At the same time, I am most concerned for Mrs El Chaar's daughters. They stand to be adversely affected if taken to Lebanon. That may also occur if Mr El Chaar is not permitted to come to Australia. In so far as Lebanon is concerned, Mr and Mrs El Chaar have not shown that they have made any effort to ease their transition into the community in Lebanon in the past and it is not to be expected that they will in the future. Taking that into account and the findings I have made regarding the difficulties they would face in adjusting to life in Lebanon, I find that their best interests lie in remaining in Australia. Whether their best interests lie in living with Mr El Chaar in Australia really depends upon whether he is going to let them, and/or their mother, down emotionally when he is here and he has achieved what he has been seeking. On the one hand, I could take the approach that, if it is not in the Australian community's interests to have a person such as Mr El Chaar here, it cannot be in the girls' best interests. On the other, it could be said that this is presuming too much. It could be that his behaviour to his own family may well be in their best interests rather than his own and that he should be given the opportunity to show that. If he were to show such behaviour, then he would be on the way to showing that he has changed his pattern of behaviour.

147. Finally, I note that the consideration of Mr El Chaar's character is taking place in the context of his application for a temporary visa. Taking that into account with all of the findings I have made regarding his past behaviour and the concerns I have expressed about his present behaviour in the context of the interests of the Australian community and of Joumana and Jenan, I have concluded that Mr El Chaar's visa should not be refused on the basis of his character. His behaviour of using other people to achieve his ends is not acceptable. It has led to his breaching the law in relation to one set of circumstances and it has been emotionally harmful to members of the community. At the same time, he has shown warmth and love to three members of the Australian community and shows interest in a fourth, his son. In the circumstances of this case, the difficulties that Jenan and Joumana are likely to face in Lebanon outweigh any harm that is likely to befall the Australian community from his presence. Should he come to Australia and should he abandon either Mrs El Chaar or her daughters emotionally or otherwise, these will be matters that will indicate that he has not changed his pattern of behaviour and no doubt become relevant in a consideration of any application he may make for a permanent visa.

148. For the reasons I have given, I:

1. set aside the decision of a delegate of the Minister dated 21 August, 2000; and
2. substitute a decision that the applicant should not be refused a visa on character

grounds pursuant to s. 501.

I certify that the one hundred and forty eight preceding paragraphs are a true copy of the reasons for the decision herein of Miss S A Forgie (Deputy President)

Signed:
Catherine Hutchins (Associate)

Dates of Hearing	2, 3 April 2001
Date of Decision	16 August 2001
Counsel for the Applicant	Mr Hemsley
Solicitor for the Applicant	Mary Lindsay & Associates
Counsel for the Respondent	Mr Leerdam
Solicitor for the Respondent	Sparke Helmore